

EXHIBIT A

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17 UNITED STATES DISTRICT COURT

18 NORTHERN DISTRICT OF CALIFORNIA

19 All Nippon Airways Company, Ltd ,

Case No 07-03422 EDL

20 Plaintiff,

21 vs.

22 United Air Lines, Inc ,

23 Defendant.

**DECLARATION OF SCOTT TORPEY IN
SUPPORT OF DEFENDANT UNITED AIR
LINES, INC.'S MOTION TO COMPEL
DISCOVERY AND FOR ADDITIONAL
TIME TO DEPOSE WITNESSES**

DATE: January 29, 2008

TIME: 9:00 a.m.

CTRM: San Francisco

JUDGE: Elizabeth D. Laporte

DECLARATION OF SCOTT TORPEY

24 STATE OF MICHIGAN)

25) SS.

26 COUNTY OF OAKLAND)

27 I, Scott Torpey, being duly sworn according to law, hereby depose and state:

1 1. I am a partner at the law firm of Jaffe Raitt Heuer & Weiss, P.C., in Southfield
2 Michigan. I am duly licensed and qualified to practice law in California. I represent Defendant
3 United Air Lines, Inc., ("United") in the above-captioned matter, which All Nippon Airways
4 Company, Ltd., ("ANA") filed against United on June 28, 2007. I make this Declaration in
5 support of United's Renewed Motion to Compel to Compel Discovery and For Additional Time
6 to Depose Witnesses and to certify, pursuant to Fed. R. Civ. P. 37(a)(1), Civ. L.R. 1-5(n) and
7 Civ. L.R. 37-1(a) that I took the following actions to obtain the relief requested in this Motion
8 without the intervention of the Court: (a) On December 21, 2007, I called ANA's counsel to
9 discuss the issues raised by the motion. Additionally, I informed ANA's counsel at the
10 depositions of ANA's flight crew, which took place on November 27, 28 and 29, 2007, that I
11 would be filing a motion to compel; (b) as described below, *see* ¶¶ 23, 24, I conducted face-to-
12 face meetings with counsel for ANA on January 24 and 25, 2008 regarding the issues raised in
13 this Motion. Unresolved issues remained after these meetings, thus necessitating the filing of the
14 Renewed Motion to Compel.

15 2. On July 24, 2007, United served ANA with a Notice of Taking Video Depositions
16 of Teruo Usui, Eishin Yamaguchi, and Yusuke Nishiguchi ("Notice"), who comprised the flight
17 crew that was operating ANA's aircraft when the collision at issue in this litigation occurred. A
18 true and correct copy of the Notice is attached hereto as **Exhibit 1**.

19 3. United noticed the depositions to be held in San Francisco. ANA subsequently
20 requested that the depositions be held in its attorney's Los Angeles office rather than San
21 Francisco. United agreed to accommodate this request.

22 4. On September 12, 2007, United served ANA with an Amended Notice of Taking
23 Video Depositions ("Amended Notice"), re-noticing the depositions for November 27-29, 2007
24 in Los Angeles. A true and correct copy of the Amended Notice is attached hereto as **Exhibit 2**.
25 In the Notice and Amended Notice, United requested that ANA bring certain documents to the
26 depositions. United asked for documents reflecting accidents, incidents and disciplinary actions
27

1 involving ANA's flight crew, training and certification records for the flight crew, and
2 documents regarding the SGHA

3 5. On November 16, 2007, United served its Third Amended Notice of Taking
4 Video Depositions ("Third Notice"), adding to its previous document requests a request for
5 copies of the current ANA Flight Operations Manual, the Manual that was in effect on the date
6 of the incident, any documents that ANA or the flight crew were required to have on board the
7 aircraft, and routing documents for the flight. A true and correct copy of the Third Notice is
8 attached hereto as **Exhibit 3**.

9 6. On October 12, 2007, United served ANA with its First Request to Produce, a
10 true copy of which is attached hereto as **Exhibit 4**. As it did in the deposition notices, United
11 asked for information regarding the pilots, including disciplinary records from 1995 to date,
12 training and certification records from 1995 to date, and records related to any accident or
13 incidents they were involved in from 1995 to date. United also asked for unedited copies of the
14 recordings taken by ANA's Cockpit Voice Recorder ("CVR") at the time of the accident, ANA's
15 conflict clearing policies, and documents regarding the SGHA and the annexes thereto.

16 7. United received ANA's response to the First Request Produce on November 19,
17 2007. A true and correct copy of ANA's response is attached hereto as **Exhibit 5**. ANA
18 objected to every single request and produced minimal documents. Regarding United's requests
19 for information about the flight crew, ANA raised boiler-plate objections and an objection based
20 upon "Japan's Act on the Protection of Personal Information." Nonetheless, ANA stated that the
21 information would be produced at the depositions if the pilots agreed to waive the protections of
22 the Act. Further, ANA agreed to make the CVR recording(s) available for inspection and
23 copying. ANA did not object to production of the CVR recording(s) on the ground that federal
24 law barred such discovery, as it now does.

25 8. On November 19, 2007, ANA's attorney e-mailed me stating that he now
26 intended to produce the pilots for deposition in San Francisco rather than Los Angeles, even
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1 though United moved the depositions to the Los Angeles offices of ANA's counsel at his
2 request. Attached hereto as **Exhibit 6** is a true and correct copy of United's Fourth Amended
3 Notice of Taking Video Depositions, re-noticing the depositions for San Francisco. This
4 unilateral change was purportedly made to accommodate the pilots' work schedules, as counsel
5 indicated they would be flying in and out of San Francisco on working flights. This assertion
6 proved at the depositions to be false, as all three pilots testified that they flew into San Francisco
7 as passengers, were flying out as passengers, and would not be working again for several days.
8 As a result of the change in the location, United incurred thousands of dollars in additional
9 expenses. I had to cancel a nonrefundable ticket to Los Angeles and buy a new, more expensive
10 ticket on short notice just prior to the Thanksgiving holiday to San Francisco at a cost of
11 \$1,400.00. Also, United incurred hotel and meal expenses for its Los Angeles-based interpreter
12 and co-counsel for four days. That would not have been necessary had the deposition remained
13 in Los Angeles. It is estimated that these additional expenses exceeded \$2,500.00. Additionally,
14 fees for the travel time to and from San Francisco for the interpreter and co-counsel are estimated
15 to be in excess of \$1,000.00.

16 9. The deposition of ANA's pilot in command, Mr. Yamaguchi, commenced on
17 November 27, 2007. A true and correct copy of the mini-transcript, video, and deposition
18 exhibits from Eishin Yamaguchi's deposition is attached hereto as **Exhibit 7**. At the deposition,
19 ANA produced a few, redacted pages (in Japanese) regarding the pilots' training and certification
20 and an incomplete version of its current Operations Manual. ANA produced nothing else of
21 substance. Further, to make the most use of the time, I proposed that the deposition be taken
22 primarily in English and that the interpreters be used only where necessary. This proposal was
23 reasonable considering that Mr. Yamaguchi, Mr. Nishiguchi and Mr. Usui all understand and
24 speak English fluently, as required for commercial airline pilots. ANA's counsel declined the
25 offer without even attempting to proceed in English. This full translation drastically reduced the
26 time available to conduct the deposition, and the delay was compounded by the fact that both
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1 United and ANA had interpreters present.

2 10. ANA's counsel did not even allow United the full seven hours available under
3 Fed. R. Civ. P. 30(d)(1) for the deposition of Mr. Yamaguchi. As the court reporter's certificate
4 shows, a true and correct copy of which is attached hereto as **Exhibit 8**, counsel unilaterally
5 terminated the deposition after only 6 hours and 36 minutes on the record, which, in actual
6 deposition time, was closer to three to four hours due to the extensive delay caused by the
7 English/Japanese translation, the objections posed by ANA's attorney and argumentation over
8 various issues.

9 11. All three pilots gave extremely evasive and non-responsive testimony at their
10 depositions, aided by counsel's suggestive objections. An example of this occurred during Mr.
11 Nishiguchi's deposition. A true and correct copy of the mini-transcript, video, and deposition
12 exhibits from the deposition of Yusuke Nishiguchi is attached hereto as **Exhibit 9**. During the
13 deposition, I asked Mr. Nishiguchi several clear and direct questions as to what he would do if
14 there was a potential conflict between his plane and another plane and he was unsure whether a
15 collision would occur. Mr. Nishiguchi spent 45 minutes dodging the questions. Taking a cue
16 from the "form, foundation and incomplete hypothetical" objections repeatedly raised by ANA's
17 attorney, Mr. Nishiguchi ultimately refused to give any substantive answer, stating that he could
18 not answer "hypothetical questions the conditions of which are incomplete." During this
19 exchange with Mr. Nishiguchi, ANA's counsel objected 17 times.

20 12. I went through a very similar exchange with Mr. Usui, who refused to answer
21 questions about what he would do if there was a potential conflict between his airplane and
22 another plane. A true and correct copy of the mini-transcript, video, and deposition exhibits
23 from the deposition of Teruo Usui is attached hereto as **Exhibit 10**. This evasion lasted for over
24 one hour. ANA's counsel raised 29 form, foundation and incomplete hypothetical objections
25 during this span of the deposition.

26 13. On or about December 13, 2007, ANA served United with additional documents
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1 in response to United's First Request to Produce. A true and correct copy of the letter
2 accompanying the documents is attached hereto as **Exhibit 11**. For the first time, ANA asserted
3 that discovery of the CVR recording(s) was barred as a matter of federal law.

4 14. A true and correct copy of a printout of the National Transportation Safety
5 Board's Docket Contents for the investigation of the collision at issue in this litigation is attached
6 hereto as **Exhibit 12**.

7 15. 14 C.F.R. § 91.609(e)(2) requires that a CVR be powered up from the
8 commencement of the pre-flight checklist by the pilots until the completion of the final checklist
9 at the end of the flight. On information and belief, the CVR recordings in the ANA airplane
10 consisted of six audio files, including a recording taken by the cockpit's area microphone and
11 another that is a combined interphone/p.a. recording.

12 16. The partial CVR transcript that exists in this case was prepared by ANA and
13 submitted to the NTSB, which did not prepare its own transcript. A true and correct copy of the
14 partial transcript is attached hereto as **Exhibit 13**.

15 17. On December 21, 2007, United filed a Notice of Motion and Motion to Compel
16 Discovery and for Additional Time to Depose Witnesses ("Motion"), by which United sought an
17 order compelling ANA to produce the materials it was withholding and permitting United
18 additional time to depose the flight crew. (Docket No. 45) United set the matter for hearing on
19 Tuesday, January 29, 2008. *Id.* The motion was subsequently rescheduled to Wednesday,
20 January 30, 2008. (Docket No. 46)

21 18. In support of the Motion, United filed a Memorandum of Points and Authorities
22 fully discussing the issues involved in the Motion and the relief United sought. (Docket No. 45).

23 19. On January 9, 2008, ANA filed its Memorandum in Opposition to United's
24 Motion to Compel Discovery and for Additional Time to Depose Witnesses, fully setting out its
25 position on the issues involved in the Motion. (Docket No. 47).

26 20. On January 16, 2008, United filed its Reply to ANA's Opposition. (Docket No.
27

1 49)

2 21. On January 22, 2008, the Court entered an order denying United's Motion to
3 Compel without prejudice based upon a finding that the Declaration of Scott Torpey submitted in
4 support of the Motion did not contain sufficient facts to demonstrate compliance with the meet
5 and confer requirement of Civ. L. R. 1-5(n) and 37-1(a). (Docket No. 50) In pertinent part, the
6 Court stated the following in the order:

7
8 It is hereby ORDERED that UAL's motion is DENIED WITHOUT
9 PREJUDICE. UAL may refile its motion after its counsel meets and confers
10 with ANA's counsel about the issues in UAL's motion. Counsel shall meet
11 and confer through good faith, detailed, face-to-face or telephonic
12 conversations about the issues raised in the motion. If the parties have
13 unresolved issues after doing so, the Court will resolve those issues. The
14 Court will entertain a request to shorten time on such a motion

15 (Docket No 49, pp 1-2)

16 22. The Court also instructed ANA to provide United with a declaration stating which
17 categories of documents it had fully produced, if any.

18 23. On January 24, 2008, while in California for a deposition in this case, I had a
19 face-to-face meeting with Marshall Turner and Scott Cunningham, counsel for ANA, to discuss
20 the issues raised in United's Motion to Compel.

21 24. On January 25, 2008, I had a second face-to-face meeting with Mr. Turner and
22 Mr. Cunningham during which we discussed the issues raised in United's Motion. These
23 meetings resolved some, but not all, of those issues. Specifically, ANA produced a copy of the
24 *current* version of its Japanese-language Operations Manual and agreed to produce the personnel
25 files of pilots Yusuke Nishiguchi, Eishin Yamaguchi and Teruo Usiu following the entry of a
26 protective order. Other issues raised by the motion remain in dispute, as described in United's
27 Renewed Motion to Compel Discovery and for Additional Time to Depose Witnesses.

28 25. A true and correct copy of ANA's Second Set of Document Requests to United

25. A true and correct copy of ANA's Second Set of Document Requests to United Air Lines, Inc., is attached hereto as **Exhibit 14**. In this Document Request, ANA asks United to produce many of the same documents it has withheld, and is withholding, from United on relevance and other specious grounds. These documents include United's Operations Manuals, documents United and/or its flight crew were required to have on board the aircraft and routing documents.

26. A true and correct copy of the Declaration of Marshall S. Turner in Support of ANA's Production of Documents is attached hereto as **Exhibit 15**.

FURTHER AFFIANT SAYETH NOT.


Scott Torpey

Subscribed and sworn to before me
this 30th day of January, 2008



Notary Public, Wayne County, MI

My Commission Expires: SHEILA A. RENCHER
Notary Public, Wayne County, MI
My Commission Expires April 20, 2008

Acting in Oakland County, MI